IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NOEL SAGUILIG BONI,
Appellant.

No. 2 CA-CR 2013-0092
Filed March 31, 2014

Appeal from the Superior Court in Pima County
No. CR20100465001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Isabel G. Garcia, Pima County Legal Defender, Tucson
By Robb P. Holmes, Assistant Legal Defender
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Judge Brammer concurred.[1]

M I L L E R, Judge:

¶1 Noel Boni was convicted after a jury trial of leaving the scene after causing an accident resulting in injury, simple assault, aggravated assault, aggravated driving under the influence, and aggravated driving with an alcohol concentration of 0.08 or more. He was sentenced to concurrent and consecutive terms totaling nine years' imprisonment. Boni argues the trial court erred in denying his motion to suppress evidence and in denying in part his motion for a judgment of acquittal on amended Count One, leaving the scene after causing an accident resulting in serious physical injury, and Count Three, aggravated assault.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to upholding the convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the night of January 30, 2010, a minivan failed to stop at a red light, struck a pedestrian, N.A., in a crosswalk, and left the accident scene. An eyewitness to the accident described the minivan as "grayish bluish" with a bike rack on the rear of the vehicle. Soon after, police officers located an unoccupied minivan matching this description parked on the shoulder of a freeway. Tucson Police Officer Andre Gamulo observed Boni walking on the freeway's frontage road carrying a gas can and pulled into a secluded parking lot, waiting for Boni to walk past. When he did, Officer Gamulo asked Boni what he was doing, and Boni informed him that he had run out of gas. Boni was asked

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[1]The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

to describe his vehicle and indicated it was "a van with a bike rack on the back" located "on the freeway." Officer Gamulo then read Boni his rights pursuant to *Miranda*[2] and called for other officers to come to the scene.

¶3 Tucson Police Officer Christopher Morand arrived and began questioning Boni. He noticed that Boni's "eyes were red and watery," that "[h]e had a flushed appearance to his face," and that "he had an odor of alcohol emitting from his breath." After Boni admitted he had been drinking that evening, Officer Morand began to administer field sobriety tests—all of which Boni failed. Officer Morand placed Boni under arrest for driving under the influence (DUI).

¶4 Boni was charged with one count each of leaving the scene after causing an accident resulting in death or serious injury, aggravated assault based on serious physical injury, aggravated assault based on the use of a deadly weapon or dangerous instrument, aggravated DUI while his license was suspended, revoked, or restricted, and aggravated driving with an alcohol concentration of 0.08 or more while his license was suspended, revoked, or restricted. The trial court denied Boni's motion to suppress the evidence resulting from his encounter with Officers Gamulo and Morand.

¶5 At the close of the state's case-in-chief, Boni moved for a directed verdict of acquittal on all counts, pursuant to Rule 20, Ariz. R. Crim. P. The trial court granted Boni's motion in part, finding that the state had not established there was a serious physical injury and therefore "there was not substantial evidence to warrant a conviction" for Count One, leaving the scene after causing an accident resulting in serious injury, or Count Two, aggravated assault, serious physical injury. The court allowed the lesser included offenses of leaving the scene after causing an accident resulting in injury and simple assault to go to the jury. Boni was found guilty of amended Count One, leaving the scene of an

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

accident resulting in injury, and amended Count Two, simple assault, as well as the other charges.

Motion to Suppress

¶6 Boni argues the trial court erred in denying his motion to suppress evidence obtained at the time of his arrest, claiming the police officers lacked reasonable suspicion to detain him and lacked probable cause to arrest him.

¶7 In reviewing the denial of a motion to suppress evidence, we consider only the evidence presented at the suppression hearing, *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996), and view that evidence in the light most favorable to upholding the trial court's ruling, *State v. Rodriguez*, 205 Ariz. 392, ¶ 34, 71 P.3d 919, 929 (App. 2003). We defer to the trial court's findings of fact, including its evaluation of witness credibility, but review de novo the court's determinations of reasonable suspicion and probable cause. *State v. Sweeney*, 224 Ariz. 107, ¶ 12, 227 P.3d 868, 872 (App. 2010); *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 577 (App. 2005).

Reasonable Suspicion for Investigatory Stop

¶8 Boni first contends Officer Gamulo lacked reasonable suspicion to stop and question him because, although officers were looking for a blue van with a bike rack and possible damage to the front passenger area, "[t]hey had no description of the van's make, model, or year, no information about the license plate number, and no information about the occupant or occupants of the van." The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. A limited investigatory stop "'is permissible under the Fourth Amendment if supported by reasonable suspicion' that criminal activity is afoot." *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996), *quoting Ornelas v. United States*, 517 U.S. 690, 693 (1996); *see also Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). "Reasonable suspicion that a person is wanted in connection with a completed felony also can justify a brief stop." *State v. Kinney*, 225 Ariz. 550, ¶ 14, 241 P.3d 914, 919 (App. 2010).

¶9 But not every police-citizen encounter implicates the Fourth Amendment. *See State v. Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d 392, 395 (App. 2000). Indeed, "[l]aw enforcement officers have wide latitude to approach people and engage them in consensual conversation." *State v. Hummons*, 227 Ariz. 78, ¶ 7, 253 P.3d 275, 277 (2011). A stop constitutes a seizure only when "by means of physical force or a show of authority, [a person's] freedom of movement is restrained," and "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 553, 554 (1980).

¶10 At the suppression hearing, the parties stipulated to the facts as summarized by the trial court. Police officers were looking for a blue or gray minivan with a bike rack that had left the scene of an injury accident involving a pedestrian. A police officer located an unoccupied minivan matching this description on the freeway. The abandoned vehicle had "damage on the right passenger front area" that matched where witnesses indicated the victim had been hit. When Officer Gamulo noticed Boni walking on the frontage road to the freeway and asked him what he was doing, Boni indicated that he was getting gas for his minivan located on the freeway. Gamulo then read Boni his rights and upon further questioning Boni admitted to having consumed "some beer a few hours earlier." After participating in a series of field sobriety tests, Boni was arrested.

¶11 The trial court ruled "the initial encounter that the police had with Mr. Boni was consensual"; alternatively, "the totality of the circumstances indicate[d] that the police officers had reasonable suspicion to stop and question Mr. Boni." We agree with the trial court's determination that Officer Gamulo's initial encounter with Boni was consensual. Gamulo merely asked Boni a question as he walked along a public street. Boni did not attempt to end the conversation or ask to leave. Thus, Gamulo did not "seize" Boni for purposes of the Fourth Amendment when he initiated the encounter. *See State v. Robles*, 171 Ariz. 441, 443, 831 P.2d 440, 442

(App. 1992) (suspect approached and questioned by officers as he exited his parked vehicle was not subject of investigatory stop).

¶12 Assuming for the purpose of addressing Boni's additional argument that Officer Gamulo's questioning was a nonconsensual seizure, the requisite reasonable suspicion existed to conduct an investigatory stop. Boni was seen walking near an unoccupied vehicle with characteristics that matched an eyewitness's description of one involved in a hit-and-run injury accident. Given the circumstances, Gamulo reasonably could have suspected that Boni should be detained and that further investigation was needed. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (noting police officers may detain individual to resolve ambiguity even if individual's conduct susceptible to innocent explanation); *State v. Ramsey*, 223 Ariz. 480, ¶ 23, 224 P.3d 977, 982 (App. 2010) ("The facts constituting reasonable suspicion cannot be viewed in isolation, or subtracted in a piecemeal fashion from the whole, but must be considered in the context of the totality of all the relevant circumstances.").

Probable Cause for Arrest

¶13 Boni also claims the trial court erred by finding that there was sufficient evidence to constitute probable cause to arrest him. Specifically, Boni contends that "there was no proof that he was driving when the accident happened, and there was no proof that he was impaired when driving at the time the van ran out of gas."

¶14 When an arrest occurs, the Fourth Amendment requires it be based on probable cause. *State v. Serna*, 232 Ariz. 515, ¶ 12, 307 P.3d 82, 85 (App. 2013). "Probable cause is something less than the proof needed to convict and something more than suspicions." *State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989). "A police officer has probable cause when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, ¶ 30, 14 P.3d 997, 1007-08 (2000), *vacated in part on other grounds*, 204 Ariz. 572, ¶ 8, 65 P.3d 953, 955 (2003). In the DUI context, "probable cause does not require law enforcement

'to show that the operator was in fact under the influence'; '[o]nly the probability and not a prima facie showing of intoxication is the standard for probable cause.'" *Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d at 576, *quoting Smith v. Ariz. Dep't of Transp.*, 146 Ariz. 430, 432, 706 P.2d 756, 758 (App. 1985) (alteration in *Aleman*). "When assessing whether probable cause exists, 'we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *State v. Dixon*, 153 Ariz. 151, 153, 735 P.2d 761, 763 (1987), *quoting Brinegar v. United States*, 338 U.S. 160, 175 (1949).

¶15 Here, Boni displayed signs and symptoms of intoxication: his eyes were red and watery, his face was flushed, and his breath smelled of alcohol. He also admitted he had been driving that evening. Moreover, Boni's minivan matched the description of a vehicle involved in a hit-and-run accident earlier that evening, including damage to the minivan consistent with how the vehicle struck N.A. Thus, the directly observed signs of alcohol impairment coupled with a reasonable inference that Boni had run a red light and struck a pedestrian in a crosswalk were sufficient to establish probable cause for arrest. *See Howard*, 163 Ariz. at 49-50, 785 P.2d at 1237-38 (sufficient evidence supported probable cause finding when defendant's car rear-ended other vehicle and paramedic at scene "detected an odor of alcohol"); *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983) (officer had probable cause to make DUI arrest after officer found defendant unconscious in vehicle parked off roadway and noted strong odor of alcoholic beverage on him and in vehicle).

¶16 Accordingly, for the reasons outlined above, the trial court did not err in denying Boni's motion to suppress.

Motion for Judgment of Acquittal

¶17 Boni argues the trial court erred in denying his motion for judgment of acquittal on amended Count One, leaving the scene of an accident involving injury, and Count Three, aggravated assault, pursuant to Rule 20, made at the close of the state's case-in-chief. Boni contends the state failed to present substantial evidence he had been involved in the accident. We review the court's denial

of a Rule 20 motion de novo, viewing the evidence in the light most favorable to sustaining the verdict. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶18 A motion for judgment of acquittal should be granted only if "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20; *see also State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (judgment of acquittal appropriate only if no substantial evidence to warrant conviction). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). "If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury." *State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006).

¶19 The trial evidence established that a blue or gray vehicle with a bike rack had struck N.A. and left the accident scene. As discussed above, officers discovered not far away a minivan on the shoulder of the freeway matching this description with damage to the front passenger side, consistent with an eyewitness's account of the accident. Boni admitted that the minivan on the freeway was his and that he had run out of gas.

¶20 Based on the evidence presented, reasonable persons could conclude the vehicle that struck N.A. was driven by Boni. Accordingly, substantial evidence was presented to sustain Boni's convictions.

Fundamental Error in Assault Counts

¶21 In reviewing the record in connection with the claims Boni raised on appeal, we found an apparent double jeopardy violation resulting from his having been convicted of both aggravated assault and the lesser included offense of assault. *See State v. Price*, 218 Ariz. 311, ¶ 4, 183 P.3d 1279, 1281 (App. 2008)

("[D]ouble jeopardy principles prohibit convictions for both a greater and a lesser included offense."). "Although we do not search the record for fundamental error, we will not ignore it when we find it." *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). A double jeopardy violation is fundamental, prejudicial error. *State v. Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d 769, 772 (App. 2008). We ordered the parties to submit supplemental briefs on the issue. The state conceded that "double jeopardy principles preclude Boni's convictions for both count 3, aggravated assault with a deadly weapon or dangerous instrument and count 2, simple assault." Boni joined in the arguments and authorities submitted by the state in lieu of filing a supplemental brief.

¶22 The double jeopardy clauses of the federal and state constitutions protect criminal defendants from multiple convictions for the same offense. *Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d at 772; *see also* U.S. Const. amend. V; Ariz. Const. art. II, § 10. "Distinct statutory provisions constitute the same offense if they are comprised of the same elements." *State v. Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d 1150, 1154 (App. 2002). Accordingly, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also State v. Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d 395, 397 (2000).

¶23 In its supplemental brief, the state concedes Boni's misdemeanor assault conviction violates double jeopardy principles, because both the aggravated assault charges were predicated on the same simple assault under A.R.S. § 13-1203(A)(1), and that "Boni could not have committed aggravated assault without also having committed simple assault." In other words, his conviction for misdemeanor assault did not require "'proof of an additional fact'" not already required for his conviction on the greater charge of aggravated assault with a deadly weapon. *Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d at 1154, *quoting Brown v. Ohio*, 432 U.S. 161, 166 (1977). Accordingly, the state acknowledges we should vacate Boni's misdemeanor conviction. *See State v. Welch*, 198 Ariz. 554, ¶ 13, 12 P.3d 229, 232 (App. 2000) (appellate court may vacate conviction and

sentence for lesser included offense to correct double jeopardy violation). We agree.

Criminal Restitution Order

¶24 Although Boni has not raised the issue on appeal, we find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805.[3] In the sentencing minute entry, the trial court ordered "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." The trial court's imposition of the CRO before the expiration of Boni's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the court ordered the imposition of interest be delayed until after Boni's release. *See id.* ¶ 5.

Disposition

¶25 For the foregoing reasons, we vacate Boni's conviction and sentence for Count Two, assault, and also vacate the CRO, but affirm Boni's convictions and sentences in all other respects.

[3]Section 13-805 has been amended three times since the date of the crimes. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We apply the version in effect at the time of the crimes. *See* 2005 Ariz. Sess. Laws, ch. 260, § 6; *State v. Lopez*, 231 Ariz. 561, n.1, 298 P.3d 909, 910 n.1 (App. 2013).